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Book Reviews: The Best Defense

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BOOK REVIEW

THE BEST DEFENSE. By Alan M. Dershowitz.† Random House, New York, New York. 1982. Pp. 425. Reviewed by Peter A. Zheutlin.‡

It would be unfair to review *The Best Defense* as a work of serious legal scholarship. This observation, however, is not intended to be a negative comment about the book. It merely recognizes that the book was written, and is being marketed, as a popular work. The target audience for the book exists beyond the corridors of American law schools, and in this regard *The Best Defense* succeeds quite well. It is well-paced, interesting if not always profound, and, for the most part, easy to read.

The book consists of a series of narratives detailing Professor Dershowitz's zealous representation of a fascinating array of clients and causes. The themes which connect these otherwise unrelated stories are Dershowitz's impassioned defense of the rights of the accused and his principled devotion to the rule of law.

Although some of Dershowitz's causes are tremendously important others seem hardly worth noting. In any event, Dershowitz does not discriminate and includes chapters on both. The most powerful and moving chapter in the book is the author's passionate recounting of his defense, in the Soviet courts, of the dissident, Anatoly Scharansky. In this chapter Dershowitz not only details the Scharansky trial, but the plight of other Soviet dissidents as well. By contrast, the author trivializes the narrative about his defense of nude bathers on Cape Cod's National Seashore[1] by using fatuous captions in the chapter, such as "The Right to Bare Arms" and "Naked Defiance," and by including among the book's photographs a picture of two park rangers "observ[ing] the evidence"[2] at the beach in question.

Dershowitz's other clients and causes fall in between these two extremes. The list includes such individuals as Rabbi Bernard Bergman, the notorious New York nursing home operator charged with a variety of Medicare and bribery violations; Sheldon Seigel, a member of the Jewish Defense League, charged with the murder of a young secretary in the bombing of the office of broadway impressario Sol Hurok; Frank Snepp, the former CIA agent who told more than the CIA wanted him to; Harry Reems, the male star of *Deep Throat,* prosecuted by an ag-

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1. I do not mean to belittle the importance of any constitutional issues raised by a federal regulation which prohibits nude bathing on federal land. However, the significance of the issues involved in this case pale in comparison to some of the others raised in the book. Indeed, the author recognizes this when he states that he did not regard the "desire to go naked as the most pressing legal issue of the day." THE BEST DEFENSE at 196.

2. THE BEST DEFENSE at 202-03.

gressive, born-again prosecutor in Tennessee; and F. Lee Bailey, indicted for conspiracy to commit mail fraud in 1973. The chapter on the Bailey case seems particularly insubstantial since the case has little legal significance. One senses that this chapter was included because Dershowitz wants the reader to know who prominent attorneys turn to when *they* need help.

From this potpourri, several themes and points of varying importance emerge. The most compelling and important point that Dershowitz makes is that the preservation of constitutional rights requires vigilance and devotion to principle in the face of overwhelming public and political pressure for tougher treatment of criminals. Dershowitz expresses the highly unpopular point of view that even the most odious among us are entitled to force the government to dot its i's and cross its t's in order to secure a criminal conviction.[3] The author then reminds us that great constitutional principles are often established in cases where the individual asserting the right is one of society's least desirable characters. It is the dealer caught peddling drugs to schoolchildren who argues that the search which yielded the evidence against him was unreasonable under the fourth amendment. The rapist argues that the confession beaten out of him violates the fifth amendment. The Nazi party members in Illinois argue that the first amendment protects their right to say the things decent human beings find repugnant. Therefore, it is the outcasts, the outlaws, and others at the fringe of society who require us to test the tenacity of our constitutional rights and liberties. This point warrants particular emphasis today in a society demanding harsher treatment of criminals.[4]

Dershowitz's point is that our system of justice is not simply a means to an end but an end itself. The process as well as the result must be fair. Dershowitz, therefore, applauds the role of defense attorneys, including himself, who represent those defendants who have committed crimes. Dershowitz sees these attorneys as defenders not only of clients but of justice itself. In many ways, the judicial system works contrary to the adage that one is innocent until proven guilty. Defendants face overwhelming odds when they are pitted against the enormous power and resources of the state and the presumption of guilt which permeates the criminal justice system.[5] Therefore, as a de-

3. A point made even more unpopular after the not guilty verdict in the John Hinckley trial.

4. This is not to ignore the justifiable concern that those who are convicted of crimes are often out on the streets too soon. The point here relates to the process by which convictions or acquittals are made, not to the punishment meted out.

5. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 241 (1966). By presumption of guilt I mean that participants in the criminal justice system (judges, prosecutors, police) assume that policemen do not arrest innocent people and that prosecutors do not usually waste time and money prosecuting defendants unless there is strong evidence against them. In this sense one may presume that by the time a defendant comes to trial there has been a multi-tiered selection process and that at each stage of the process a decision has been made that the defendant's "guilt"

fense attorney, Dershowitz constantly places himself in the role of the underdog, a role he clearly seems to enjoy.

A second important theme in *The Best Defense* is Dershowitz's unrestrained attack on the criminal justice system. Criticism of this system is certainly not a novel enterprise. However, most of the criticism today is directed towards a perceived laxness in the way criminals are treated. Dershowitz's attack, however, is upon the intellectual and moral bankruptcy of the players in the "justice game."[6] In the book's introduction, Dershowitz cynically states thirteen rules about the criminal justice system. These include: rule IV, "Almost all police lie about whether they violated the Constitution in order to convict guilty defendants"; rule V, "All prosecutors, judges, and defense attorneys are aware of rule IV"; rule VIII, "Most trial judges pretend to believe police officers who they know are lying"; rule IX, "All appellate judges are aware of rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers"; and finally rule XIII, "Nobody really wants justice."[7] The evidence to substantiate these rules is supposedly found in the series of narratives which form the book. There are occasional anecdotes which illustrate these statements but they do not convincingly demonstrate that these "rules" pervade the criminal justice system.

Dershowitz makes his most pointed attacks against those judges with whom he has clashed in the courtroom and who did not see things his way. He criticizes one judge who refused to overturn the sentence handed down against his client, Bernard Bergman, stating that the judge's opinion was "an artful act of verbal gymnastics" and that the judge "simply lacked the guts to free Bernard Bergman . . . ."[8]

At times Dershowitz makes strong, unsubstantiated accusations. For example, Dershowitz accuses the New York Court of Appeals of simply ignoring his arguments in the case of Melvin Dlugash.[9] A reading of the court of appeals' opinion,[10] however, does not support the charge that the court *ignored* Dershowitz's argument, although the judges may not have understood it. It is worth examining this episode in some detail, for it reveals both the strengths and weaknesses of the book.

Melvin Dlugash had been convicted by a jury of murder even though all of the expert witnesses who testified agreed that there was no way to determine whether the victim was alive at the time Dlugash shot him. Moments before Dlugash fired his shots, the victim had been re-

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warrants further steps towards trial. Thus, the closer a defendant gets to trial the greater the presumption that he is not innocent.

6. THE BEST DEFENSE at xxi.
7. *Id.* at xxi-ii.
8. *Id.* at 149.
9. *Id.* at 108-09.
10. People v. Dlugash, 41 N.Y.2d 725, 363 N.E.2d 1155, 395 N.Y.S.2d 419 (N.Y. 1977), *petition for habeas corpus granted,* 476 F. Supp. 921 (E.D.N.Y. 1979).

peatedly shot in the chest by a third person. The trial judge charged the jury with respect to both murder and attempted murder, but the charge concerning the requisite intent required for each crime was different. In the murder charge the judge told the jury that if they found that the defendant caused the death of the victim, then they could accept or reject the presumption that every person intends the natural and probable consequences of his acts.[11] Accordingly, *if* the jury were to find that Dlugash did cause the death of the victim, they were entitled to *presume* that he had the requisite intent which warranted a conviction for murder.

In charging the jury on attempted murder, the judge did not give the jury instructions which would permit them to presume intent. Instead, the judge told the jury that they could convict Dlugash of attempted murder even if the victim was already dead, but only if they "found beyond a reasonable doubt . . . that the defendant actually intended to kill the deceased, believing *in his own mind* that the deceased was living . . . ."[12]

The jury convicted Dlugash of murder and in so doing necessarily concluded that the victim was alive when the defendant shot him. The Brooklyn Appellate Division reversed the conviction because the state had "failed to prove beyond a reasonable doubt that [the victim] had been alive at the time he was shot by the defendant."[13] The appellate court also found that there was not a "scintilla of evidence" to establish that Dlugash believed the victim to be alive. Therefore, the appellate court held that Dlugash could not be guilty of attempted murder either.[14]

The state appealed this ruling, and Dershowitz argued the defendant's case before the New York Court of Appeals. The issue on appeal was whether it was murder or attempted murder to shoot a corpse. Dershowitz argued that in light of the different instructions given by the trial judge with respect to finding intent, attempted murder *in this context* could not possibly be a lesser included offense of murder. This argument was premised on the rule that "[I]f there are any elements of the lesser crime that are *not* included in the greater crime, the constitutional right to trial by jury requires that there be a new jury trial, since no appellate court may find facts that have not been found by a jury."[15]

The court of appeals found that the evidence did not establish beyond a reasonable doubt that the victim was alive when Dlugash shot him, and therefore, affirmed the appellate division's reversal of the

11. THE BEST DEFENSE at 96.

12. *Id.* at 97 (emphasis added).

13. People v. Dlugash, 51 A.D.2d 974, 975, 380 N.Y.S.2d 315, 317 (N.Y. App. Div. 1976).

14. *Id.*

15. THE BEST DEFENSE at 107.

murder conviction.[16] Much to Professor Dershowitz's disappointment, however, the court of appeals ruled that the "appellate division erred in not modifying the judgment to reflect a conviction for the lesser included offense of attempted murder."[17]

In explaining the New York Court of Appeals decision, Dershowitz complains that the court simply ignored what he believes was an irrefutable and obvious argument.[18] Despite this allegation, Dershowitz further asserts that the court of appeals simply pretended the argument was not made, something he contends "courts are prone to do when [an argument] is [too] difficult to answer . . . ."[19] Here, Dershowitz implies that the court was either ignorant, disinterested in justice, devious or unwilling to confront a difficult issue.

The merit of Dershowitz's intriguing argument is not criticized here. However, his charge that the New York Court of Appeals ignored his argument because it was too difficult to answer is simply unfounded. Professor Dershowitz's clever argument is not easily grasped. In addition, the court of appeals did detail what it called "ample" evidence which would have justified the jury in finding that the defendant actually believed the victim was alive when he shot him.[20] Therefore, the court was aware that the murder instruction with respect to intent might not be a constitutional basis for the attempted murder conviction. The problem with this, as Dershowitz points out, is that the court of appeals could not be sure that this ample evidence was in fact the evidence considered by the jury. Because the jury impliedly found, incorrectly, that the victim was alive when Dlugash shot him, they simply could have accepted the presumption as articulated in the trial judge's murder instruction. The presumption, of course, was not a part of the attempted murder instruction.

Dershowitz's argument was ultimately vindicated when a federal court granted Dlugash's habeas corpus petition. The federal court held that the jury may well have found the requisite intent for murder by applying the presumption rather than by determining that the defendant actually believed the victim to be alive.[21] Since the presumption was not a part of the *attempted murder* instruction to the jury, and because the jury found Dlugash guilty of murder, the federal court ruled that modifying the judgment to reflect a conviction for attempted murder was a violation of Dlugash's due process rights. Therefore, Dlu-

16. People v. Dlugash, 41 N.Y.2d 725, 730, 363 N.E.2d 1155, 1159, 395 N.Y.S.2d 419, 423 (N.Y. 1977), *petition for habeas corpus granted,* 476 F. Supp. 921 (E.D.N.Y. 1979).
17. *Id.* at 737, 363 N.E.2d at 1163, 395 N.Y.S.2d at 438.
18. THE BEST DEFENSE at 108.
19. *Id.* at 108-09.
20. *See* People v. Dlugash, 41 N.Y.2d 725, 736-37, 363 N.E.2d 1155, 1162, 395 N.Y.S.2d 419, 426-27 (N.Y. 1977), *petition for habeas corpus granted,* 476 F. Supp. 921 (E.D.N.Y. 1979).
21. Dlugash v. New York, 476 F. Supp. 921 (E.D.N.Y. 1979).

gash had to be released or tried separately for the crime of attempted murder.

Dershowitz seems to delight in reminding the New York Court of Appeals of his ultimate triumph over what he views as its ignorance. However, his charge of ignorance reflects an affliction common among men of uncommon brilliance — they do not suffer fools gladly and for them the world, not to mention the judiciary, is largely populated by fools. Dershowitz's assertions are unfair and do not adequately take into account the novelty of the issues raised by the case and the cleverness of his argument. The chapter on the *Dlugash* case is fascinating and it reveals Dershowitz's impressive ability as well as his impatience with lesser minds.

Dershowitz also passes up the opportunity to explain why Dlugash's conviction would strike a blow against the constitutional values he champions. He does not explain, for example, why a democratic and just society will thrive because people like Dlugash escape punishment. Moreover, he fails to explain why society will come tumbling down (or at least lose a supporting brick) were Dlugash to stand convicted. Dershowitz forcefully argues for strict adherence to constitutional principles without examining or explaining why each of the principles he raises are critical elements of a just, democratic society.

The legal arguments discussed in the chapter on the *Dlugash* case are particularly difficult reading for one not familiar with the law of attempted crimes and would likely be incomprehensible to all but the most sophisticated laymen. To the book's target audience this chapter will be most difficult to read.

Although much of the criticism leveled at judges and prosecutors may be legitimate, Dershowitz is unable to criticize without sounding pompous. The tone of the criticism detracts from its credibility, and pervades the book in other ways as well. For instance, in discussing a felony murder case he worked on during his clerkship with United States Circuit Judge David Bazelon, Dershowitz writes, with characteristic overstatement, that he and the judge "worked . . . on an opinion to spare the defendant's life."[22]

Dershowitz also displays a propensity for exaggerating the legal significance of the cases he describes. The Frank Snepp case is a good example.[23] After leaving the CIA, Snepp wrote and published *Decent Interval,* a highly critical account of the CIA's role in Southeast Asia at the end of the Vietnam War. The CIA sued Snepp after publication of the book, alleging breach of a secrecy agreement which Snepp had signed upon his employment with the CIA. That agreement prohibited Snepp from publishing "any information or material relating to the [CIA], its activities or intelligence activities generally, either during or

22. THE BEST DEFENSE at 306.
23. Snepp v. United States, 444 U.S. 507 (1979).

after the term of [his] employment by the [CIA]."[24] The CIA sought both to enjoin Snepp from publication of any further material without CIA approval, and to impose a constructive trust upon the money earned by Snepp from publication of the book. The latter relief was sought on the basis that Snepp had a fiduciary obligation to the CIA based upon sections of the secrecy agreement.

The district court granted the injunctive relief sought, and imposed a constructive trust on Snepp's earnings from the book.[25] The Fourth Circuit affirmed the district court's ruling as to the CIA contract, concluding that the agreement prevailed over Snepp's first amendment right to publish the book without first submitting it to the CIA for review.[26] The Fourth Circuit reversed the district court's holding with respect to the constructive trust, however, finding this remedy improper because no fiduciary obligation had been established.[27]

Snepp was not satisfied with what amounted to a practical victory in the Fourth Circuit. Although he could keep his earnings from the book, the court of appeals had sustained the government's position that the secrecy agreement prevailed over Snepp's first amendment rights.[28] Snepp wanted to prevail as a matter of principle, however, and he petitioned the Supreme Court for a writ of certiorari. The government filed a conditional cross-petition because, in the event that Snepp's writ was granted, it wanted review of the Fourth Circuit's decision reversing the imposition of the constructive trust.

Dershowitz was justifiably surprised and outraged when the Supreme Court rendered an opinion in the case on the petitions without even receiving briefs or hearing oral argument.[29] Relegating the first amendment issue to a footnote, the Court ruled that a constructive trust should be imposed, thus making Snepp a loser on all counts.[30] Deciding the case on the petitions is an extraordinary procedure and Dershowitz is justifiably indignant. In addition, because the Court reached out to decide an issue contained only in a conditional cross-petition, Dershowitz criticizes the decision as unwarranted "judicial activism on the part of conservative judges who claim to be adherents of judicial restraint."[31]

Again, however, Dershowitz's hyperbole undercuts the justifiable criticism. Dershowitz describes the *Snepp* case as "among the most

24. 595 F.2d 926, 930 n.1 (4th Cir.), *rev'd in part,* 444 U.S. 507 (1979).
25. 456 F. Supp. 176, 182 (E.D. Va. 1978), *rev'd in part*, 595 F.2d 926 (4th Cir.), *rev'd in part*, 444 U.S. 507 (1979).
26. 595 F.2d 926, 931-32 (4th Cir.), *rev'd in part*, 444 U.S. 507 (1979).
27. *Id.* at 929.
28. THE BEST DEFENSE at 229.
29. *See* Snepp v. United States, 444 U.S. 507, 517, 524 (1979). As Justice Stevens noted in his dissent in *Snepp,* this was a very unusual procedure for the Supreme Court to follow when rendering a decision. *Id.* at 524-25 (Stevens, J., dissenting).
30. *Id.* at 516.
31. THE BEST DEFENSE at 231.

dangerous, far reaching, and important decisions ever rendered by the Supreme Court in the area of free speech . . . ."[32] If the level of scholarly comment on the *Snepp* decision is any indication of its import, it is far from a major decision in the free speech area.[33] Dershowitz is correct in arguing that the Supreme Court ignored the significant first amendment implications of the case. The single footnote in the Court's opinion addressing the first amendment question is inadequate.[34] There is no support for Dershowitz's *ipse dixit* assertion, however, that the case is one of the most important decisions ever decided in the free speech area. Since the lay reader of *The Best Defense* is certainly not going to appreciate the exaggeration in Dershowitz's characterization, it is all the more disturbing.

Professor Dershowitz's brilliance and skill bristle throughout *The Best Defense.* One has to be impressed with his tales of legal legerdemain, his commitment to his work and the array of fascinating clients he has represented. It would, perhaps, have been impossible for Dershowitz to have written a more humble account of his uncommon experiences. There is no doubt that he deserves much praise for his ability and his considerable accomplishments, but the praise would have sounded better coming from others.

Although *The Best Defense* will not become a classic in either legal or popular literature, it provides, in spite of its flaws, several hours of provocative and stimulating reading about the author's extraordinary career. While I am critical of the book's tone, and sometimes unsupported charges, *The Best Defense* is recommended for its interesting perspective on some very unusual cases. Moreover, the book serves as a welcome change from the mass of dry material many of us spend so much time reading.

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32. *Id.* at 232.
33. As of the date of this writing, only six articles or student notes specifically written about *Snepp* have appeared in American law journals. Of these, only one is authored by a law professor. *See* Annawalt, *A Critical Appraisal of Snepp v. United States: Are There Alternatives to Government Censorship?,* 21 SANTA CLARA L. REV. 697 (1981). One article is by a law firm associate. *See* Whately, *Case Comment: Snepp v. United States,* 30 CLEV. ST. L. REV. 247 (1981). Three of the articles are student notes. *See* Comment, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment,* 81 COLUM. L. REV. 662 (1981); Note, *Constitutional Law—Snepp v. United States—Short Shrift for Prior Restraint Doctrine,* 59 N.C.L. REV. 417 (1980-81); Note, *Snepp v. United States,* 49 U. CIN. L. REV. 690 (1980). The sixth article is a two-column summary of the decision. *See* 66 A.B.A.J. 492 (April 1980).
34. Snepp v. United States, 444 U.S. 507, 509 n.3 (1979).